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IN THE

Supreme Court of the United States

October Term, 1950

No. 451

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,

Petitioners,

against

HENRY J. KAISER, KAISER COLORADO COMPANY and KAISER STEEL CORPORATION,

Respondents.

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,

Petitioners,

against

HONORABLE IRVING R. KAUFMAN, United States District Judge,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court (R. 104) is reported in 91 F. Supp. 511.

The opinions of the Court of Appeals (R. 136; M. R. 14*) are not officially reported.

Jurisdiction.

The jurisdiction of this Court is invoked by the petitioners pursuant to Title 28 of the U. S. Code, section 1254(a).

Statement of Salient Facts.

The action is at law to recover two million dollars damages. The jurisdiction is based upon diversity of citizenship. Plaintiffs are five individuals who are partners doing business under the firm name of Charles A. Koons & Co. As appears from the caption (R. 2), from the body of the complaint (R. 19-21), and from their own affidavits and statements (R. 325-6), the action is not brought in the partnership name but in the name of the individuals who are described as partners doing business under the firm name. The complaint itself shows (R. 19-21) that only three of the five plaintiffs reside in the Southern District of New York and that the other two reside, one in Connecticut, and the other in Pennsylvania. The defendant Henry J. Kaiser is concededly a resident of the State of California (petition for certiorari p. 3; complaint R. 8, M. R. 3). The defendant Kaiser Colorado Company is a California corporation (R. 8). The defendant Kaiser Steel Corporation is a Nevada corporation (R. 8).

It is undisputed that this action could have been instituted against each of the defendants in the District Court

* M. R. refers to the transcript of record on petitioners' application in the Court of Appeals for leave to file petition for mandamus.

for the Northern District of California because all the defendants reside there and, of course, venue could have been laid in the state courts of California or of New York.

Respondents Motion to Dismiss or Transfer to California.

Before answer the defendants below made several motions (R. 82-89) only one of which is pertinent upon this application for certiorari. That motion was one

> "for an order dismissing this action or, in lieu thereof, transferring it to the United States District Court for the Northern District of California, Southern Division, where the action might have been brought, on the ground that it is in the wrong district because the jurisdiction of this Court is invoked solely on the ground of diversity of citizenship and neither all of the plaintiffs nor all of the defendants reside in the Southern District of New York or the State of New York" (R. 84-5).

The defendants also moved in the alternative (1) to quash service of process on the corporate defendants upon the ground that they were not doing business in New York, and (2) to transfer the action to the District Court in California on the ground of the convenience of witnesses pursuant to U. S. Code section 1404(a).

Plaintiffs Contentions.

Plaintiffs contended (1) that because of the provisions of Rule 17b of the Rules of Civil Procedure* and Section 222*a* of the New York Civil Practice Act* their partnership *qua* partnership was the plaintiff and that such partnership

* Set forth at p. 6 *post*.

had a separate residence in the Southern District of New York; and (2) that therefore venue was properly laid in that District.

Decision in District Court.

The District Court, Irving R. Kaufman, J., in his opinion (R. 104), found that venue was improper because neither all the plaintiffs nor all the defendants were residents of the Southern District of New York, and pursuant to U. S. Code section 1406* ordered that the case be transferred to the Northern District of California where all the defendants resided and where this action could have been brought (R. 119). In view of this conclusion he did not pass upon the alternative motions.

Plaintiffs appealed from the order directing the transfer (R. 121) and simultaneously moved the Court of Appeals for leave to file petition for writ of mandamus directing the court to vacate the order of transfer (M. R. 10).

The Court of Appeals dismissed the appeal (R. 137) and denied the petition for mandamus (M. R. 15) on the authority of its own decision in *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F.(2d) 866.

Questions Presented.

The following questions are presented:

(1) Did the District Court err in holding that, although plaintiffs' partnership has its principal office in the Southern District of New York, venue was improperly laid (under 28 U. S. Code Sec. 1391*a**) in said district because two of the partners and one of the defendants were not

---

* Set forth at p. 5 *post*.

residents of said district; i.e. that neither all the plaintiffs nor all the defendants were such residents?

Only if this court concludes that the foregoing question should be reviewed in this Court within the principles stated in its Rule XXXVIII, subdivision (b), will the second and third questions be reached, namely: (2) Did the Court of Appeals err in dismissing the petitioners' appeal upon the ground that the order of the District Court transferring the action was not a final decision? (3) Did the Court of Appeals err in denying petitioners' application for leave to file petition for mandamus to prevent transfer of the action to California?

Statutes and Rules Involved.

United States Code, Title 28;

Section 1391:

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."
>
> • • • • • •
>
> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Section 1406:

> "(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Federal Rules of Civil Procedure;

Rule 17(b):

"Capacity to Sue or Be Sued. The Capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U. S. C., §§754 and 959 (a)." (As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949.)

Rule 82:

"These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

New York Civil Practice Act;

Section 222-a:

"Action or proceeding in partnership name. Two or more persons carrying on business as partners may sue or be sued in their partnership name whether or not such name comprises the names of the persons. If the persons be defendants in an action or proceeding, the summons or other process may be served upon any one or more of them with

like effect as though all of the persons had been named as defendants by their own respective names. Where a judgment is taken against the defendants, the clerk with whom the judgment-roll is filed, must write upon the docket opposite the name of each defendant upon whom the summons was served, the word 'summoned'; and a like entry must be made by each county clerk with whom the judgment is afterwards docketed. An execution upon such judgment may be collected out of the real and personal property of the partnership, and out of the real and personal property of the persons summoned, whose names shall be indorsed on the execution" (Added L. 1945 ch. 842, in effect Sept. 1).

Argument.

Summary of Argument.

POINT I will show that the decision of the District Court was correct and that there is no conflict of decision and no important question of local or federal law which requires review in this court.

POINT II will show that the Court of Appeals correctly held that the order of the District Court directing the transfer of the cause to California was not appealable.

POINT III will show that the Court of Appeals correctly denied leave to file the petition for writ of mandamus.

POINT I.

The Decision of the District Court in directing the transfer of the cause to California was correct because neither all of the Plaintiffs nor all the Defendants reside in the Southern District of New York.

As shown above, petitioners have alleged and concede that not all of the defendants reside in the Southern District of New York because they allege and admit that the defendant Kaiser is a resident of California. The petitioners allege that two of the plaintiffs are not residents of the Southern District of New York.

Petitioners urge, however, that the plaintiff is the partnership as a legal entity and that such partnership as such entity has its own residence separate and apart from that of the individual partners. From this premise petitioners urge that there is only one plaintiff — the partnership entity which has its residence in the Southern District of New York and that, therefore, venue was properly laid in that district.

The petitioners' claim is based on the provisions of Rule 17(b) of the Rules of Civil Procedure (*ante*, p. 6) which provides in substance that the *capacity* of a partnership to sue or be sued shall be determined by the law of the state in which the district court is held. Petitioners then point to section 222(a) of the New York Civil Practice Act (*ante*, p. 6) which in substance provides that two or more persons carrying on business as partners may sue or be sued in their partnership name, whether or not such name comprises the names of the persons, and provides the manner of service of summons and the effect of the judgment entered. Petitioners then argue that the capacity to sue

in the district court is to be determined by the law of the State of New York; that the law of New York permits a partnership to sue in its partnership name and that, therefore, the partnership is a jural entity which has a residence at its principal place of business in the state although not all of the individual partners reside in that district.

From all of this petitioners conclude that the venue is proper because the partnership is the plaintiff and has its residence in the Southern District.

A.

THE LAW PRIOR TO THE ADOPTION OF RULE 17(b) WAS CLEAR THAT THE RESIDENCE OF THE INDIVIDUAL PARTNERS CONTROLLED FOR VENUE PURPOSES.

In 1889 this Court decided *Smith* v. *Lyons,* 133 U. S. 315. The venue statute then in effect (Act of March 3, 1887, 24 Stat. 552 C. 373) as amended by Act of August 13, 1888 (24 Stat. 433 C. 866), was a predecessor of the present section 1391 of the Code. It provided that in cases where jurisdiction was founded on diversity, the suit could be brought only in the residence of either the "plaintiff" or the "defendant". Plaintiffs were two partners doing business under the firm name of C. H. Smith & Co. One partner was a resident and citizen of St. Louis, Missouri, in the Eastern District of Missouri, and the other was a resident and citizen of Hot Springs, Arkansas. Defendant was a resident and citizen of Sherman, Texas. It appeared in the records of the case that plaintiff "is a co-partnership doing business, residing in and a citizen of the State of Missouri, within this district", *i.e.,* the Eastern District of Missouri.*

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* Material is quoted from motion for rehearing in the Circuit Court of the United States for the Eastern Judicial District of Missouri which is printed in the Record on Appeal in the Supreme Court.

The action was brought and defendant served in the Eastern District of Missouri, the residence of only one of the partners. Defendant moved to dismiss the action on the ground that venue had been improperly laid because the suit was not brought in the district of the residence of plaintiffs or of the defendant. His motion was granted.

In their brief in this Court plaintiffs made the following contentions, among others (see pp. 24-26 of the brief of the Plaintiffs in Error in the Supreme Court):

> "The word plaintiff in law describes a co-partnership with perfect accuracy, though many persons compose the partnership. This is a partnership controversy, and the plaintiff described the situs and residence of the partnership in making the contract to be in the district where this suit is brought . . . If the word plaintiff is used here as the parties themselves used it, no difficulty arises about maintaining the jurisdiction of the Court in the case . . .
>
> ". . . There are, in fact, no plaintiffs in this case; but one plaintiff and the residence of that plaintiff the partnership, was agreed upon at the time the contract was made; and is, in fact, the residence and place of business of the partnership today; and it is in the district where this suit is instituted.
>
> ". . . A co-partnership is an initial association of persons under a co-partnership name. A corporation is a legal association of a multitude of persons under a corporate name . . . A corporation, then, is by the Courts considered a citizen of the State under whose laws the corporation was created. The partnership in this case was created under the laws of the State of Missouri and the contract of partnership described the situs of it in St. Louis, in this district . . .
>
> "The decision in the case in which this brief is filed allows an implication to exclude a partnership from its presence, though it has agreed upon a situs for itself; while the same Court in vindication of con-

> tracts made by a corporation would, if necessary in order to maintain jurisdiction, declare such a corporation to have a double citizenship under certain circumstances. In the case of a partnership the doctrine of this decision rejects it though a legal unit under precisely the same circumstances it would be accepted a proper party if it were a corporation."

This Court affirmed the judgment below which had dismissed the action because venue had been improperly laid in the Eastern District of Missouri. The Court stated (133 U. S. at p. 317):

> "In the case before us, one of the plaintiffs is a citizen of the State where the suit is brought, namely, the State of Missouri, and the defendant is a citizen of the State of Texas. But one of the plaintiffs is a citizen of the State of Arkansas. The suit, so far as he is concerned, is not brought in the State of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a state where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms, for the case of two defendants or two plaintiffs who are citizens of different States. In the present case, there being two plaintiffs, citizens of different States, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit in a State of which either of them is a citizen."

It is to be noted that the statute involved in *Smith* v. *Lyons,* provided only that in diversity cases suit had to be instituted at the residence of either "plaintiff" or "defendant". Yet this Court interpreted it to mean that where

there were plural plaintiffs and defendants, suit could be instituted only at the residence of all plaintiffs or all defendants. The Court pursuant to that interpretation held that two partners could not sue in the district where only one of them resided. *It is significant, too, that the Court of necessity rejected the contention that the partnership qua partnership should be treated as the sole plaintiff with a separate residence in the Eastern District of Missouri.*

In *Sutherland* v. *U. S.*, 74 F.(2d) 89 (C. C. A. 8th) decided in 1934 before the Federal Rules of procedure became effective, suit was brought in the District of Nebraska against a partnership and against the two persons constituting such partnership. The complaint alleged that the individual defendants resided in Missouri and that the partnership was doing business in the District of Nebraska. The Nebraska statute provided in substance that a partnership might sue or be sued "in the usual name by which it is known." At the time, the applicable venue statute (Judicial Code section 51) provided that suit had to be brought in the district in which the defendant was an inhabitant unless jurisdiction was founded on diversity. As the United States was the plaintiff the diversity provision was not applicable. The defendants urged that the suit was not maintainable as none of them was an inhabitant of the district. The Circuit Court of Appeals sustained this contention, and after reviewing the authorities said:

> "Since a corporation, as a juridical person, is an inhabitant of the state of which it is a citizen, *we think a partnership is likewise to be regarded as an inhabitant of the state of which it is a citizen, namely, the state of which the partners are citizens.*"*

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* Emphasis throughout is supplied.

> "Our conclusion is that this partnership, for the purpose of this suit, must be regarded as a citizen of Missouri and an inhabitant of the Western District of Missouri, wherein the partners reside" (74 F. (2d) at 93).

Accord, see *Gross v. Miller,* 8 Fed. Rules Service 384 (District Court, Maryland, 1943), in which the court said (at p. 386):

> "Third, as respects the venue requirements of Section 51, a partnership has no 'residence' other than that of the members who compose the partnership. That is to say, a partnership is not an entity distinct from its members. Sutherland *v.* United States, 74 F. (2d) 89; Langstaff *v.* Lucas, 9 F. (2d) 691; affirmed 13 F. (2d) 1022; certiorari denied 273 U. S. 721. Nor does the Uniform Partnership Act which exists in Maryland (Annotated Code of Maryland, Article 73(a), Secs. 1 to 43, inclusive), make a partnership an independent legal entity. Helvering *v.* Smith, 90 F. (2d) 590."

This Court's ruling in *Smith* v. *Lyons* was incorporated into Section 1391(a) of the present Judicial Code (*ante,* p. 5). The Reviser's notes to that Section set forth in United States Code annotated state as follows:

> "Reference to 'all plaintiffs' and 'all defendants' were substituted for references to 'the plaintiff' and 'the defendant' in view of many decisions holding that the singular terms were used in a collective sense. See *Smith* v. *Lyon,* 1890, 10 S. Ct. 303, 133 U. S. 315, 33 L. Ed. 635 . . ."

It would therefore appear that the holding in *Smith* v. *Lyons, supra,* insofar as it concerned suits by partnership, was expressly intended to be incorporated into Section

1391 and to continue to be controlling. Moreover, if any change in the existing law had been intended it would have been expressly dealt with in the same manner as section 1391 (c) dealt with corporations. (See p. 19, *post.*)

B.

Rule 17(b) and Section 222(a) of the Civil Practice Act have not changed the pre-existing law and the Rule of *Smith* v. *Lyons.*

Rule 17(b) (*ante,* p. 6) provides that "capacity" of a partnership to sue or to be sued is to be determined by the law of the state in which the district court is held with the proviso that a partnership which has no such capacity may sue or may be sued for the purpose of enforcing rights under the Constitution or the laws of the United States.

Rule 82, which has been wholly ignored by the petitioners, provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

Rule 17(b) has no relationship whatsoever to the question of residence, citizenship or venue. It was not intended to and because of Rule 82 could not validly override the existing law as to diverse citizenship or venue. Rule 17(b) has to do solely with the question of the "capacity" of an individual, a corporation, or a partnership or other unincorporated association to come into or be brought into court. It has no relationship to the question as to *where* the suit may be instituted or the *requirements as to diversity.* It does not purport to provide that a partner-

ship has the capacity to sue in any Federal court in any district irrespective of the residence requirements of Section 1391(a) of the Judicial Code simply because it may maintain an action in the State court in the partnership name. It does not purport to provide that because of capacity to sue in its partnership name the partnership has a "residence" irrespective of the place of residence of the partners. It does not provide that a partnership which can sue in its partnership name is a legal entity.

In the Act of June 19, 1934, chapter 51, empowering this court to prescribe rules, it is provided that the rules should not take effect until they have been reported to Congress at the beginning of a regular session thereof and until the close of said session. After the rules were reported to Congress, hearings were held before the Committee on Judiciary of the House, 75th Congress, Third Session with regard to the rules theretofore adopted by this court. William D. Mitchell, Esq., the Chairman of the Advisory Committee appointed by this court appeared before the House Committee and at page 18, in discussing Rule 17(b), stated:

> "We come now to the question of capacity to sue. In the first place, reference has been made to the fact that the rule says that the capacity to sue shall be determined by the law of the domicile of the corporation. With all due deference to Dean Clark, who has doubts about its meaning, I do not have the slightest doubt and I do not believe the other 14 members of the advisory committee have. *The capacity to sue is one thing, and how, when, and where to sue is another, and we must always bear in mind that we are dealing only with capacity,* **technical** *capacity.* This rule simply means this, that if under the law of Delaware a corporation is organized and under the law of its domicile, Delaware, it has the capacity

> to sue or be sued, then it can be sued or sue anywhere and if it has not any capacity to sue or be sued under the law of its domicile, it cannot sue or be sued anywhere."

In response to an inquiry as to the application of the rules to the question of diversity of citizenship with respect to corporations, Mr. Mitchell stated that the rules had no application:

> "Mr. Mitchell: No; because the question of citizenship is a question of jurisdiction and these rules do not affect jurisdiction and they do not affect venue."

There is no suggestion in the hearings that Section 17(b) had any effect on venue.

The application of Rule 82 (*ante*, p. 6) has been considered in cases in this Court and the Court of Appeals.

In *Mississippi Pub. Corp.* v. *Murphree*, 326 U. S. 438, the plaintiff resided in the Northern District of Mississippi and brought suit in that district against a defendant having an office in the Southern District of Mississippi. Jurisdiction was based upon diversity and the summons was served in the Southern District upon the agent designated by the defendant to receive service of process within the state. Service was made pursuant to Rule 4(f) which provides that all process may be served anywhere within the territorial limits of the state in which the district court is held. This Court held that Rule 4(f) by permitting service anywhere in the state in an action which was filed in the district of which the plaintiff was a resident was not inconsistent with Rule 82. This Court said:

> "It is true that the service of summons is the procedure by which a court having venue and juris-

> diction of the subject matter of the suit asserts jurisdiction over the person of the party served. But it is evident that Rule 4(f) and Rule 82 must be construed together, and that the Advisory Committee, in doing so, has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts as defined by the statutes, §§51 and 52 of the Judicial Code in particular, rather than the means of bringing the defendant before the court already having venue and jurisdiction of the subject matter. Rule 4(f) does not enlarge or diminish the venue of the district court, or its power to decide the issues in the suit, which is jurisdiction of the subject matter, Industrial Assn. *v.* Commissioner, 323 U. S. 310, 313, to which Rule 82 must be taken to refer. Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained."

This case is clear recognition of the rule contended for by the respondents, namely, that the provisions of the venue statute cannot be extended because of the rule.

In *Vaughan* v. *Empresas Hondurenas,* 171 F. 2d 46 (U. S. C. A. 5th Cir.), it was held that Rule 4(f) permitting service of process within the territorial limits of a state within the district did not extend the venue of the District Court beyond what it was before the rules became effective in view of the provisions of Rule 82 and it was held that an alien corporation could be sued only in a district where it could be validly served. The argument in support of the claim that the venue was proper was that Rule 4(f) had enlarged the available venue. The Court speaking through Sibley, J., said:

> "We think the Rule cannot be accorded such an intention or effect, because Rule 82 expressly says: 'These rules shall not be construed to *extend* or limit the jurisdiction of the district courts of the United States or *the venue of actions therein.*' We ought not therefore to say that Rule 4(f) has extended the venue in the Southern District Court beyond what it was before. *Though there was no express statute fixing the venue of a suit against an alien corporation, we regard it as having been settled by judicial decisions that the venue was only 'in any district in which valid service can be made upon the defendant.'*"

And so here prior to the Adoption of Rule 17(b) "there was no express statute fixing the venue of a suit" brought by individuals doing business as a partnership but it was settled by *Smith* v. *Lyons,* 133 U. S. 315 (*ante,* p. 9) and *Sutherland* v. *U. S.,* 74 F. (2d) 89 that the venue was only in the district in which all of the partners resided.

Rule 17(b) in effect incorporates by reference the provisions of Section 222(a) of the Civil Practice Act for the purpose of determining capacity to sue. If such incorporation by reference is construed to encompass venue as well as "capacity," as petitioners argue, such construction would in effect work an amendment of the venue statute (28 U. S. C. 1391(a)), as interpreted in *Smith* v. *Lyons* (*ante,* p. 9), and *Sutherland* v. *United States* (*ante,* p. 12), by extending venue in the District Courts. This would violate the plain mandate of Rule 82 that the rules should not be construed so as to limit or extend venue.

In view of the fact that over a period of many years prior to the adoption of Rule 17(b) it was established that the residence of the individual partners controlled for venue purposes, it is not to be assumed that merely by pro-

viding that a partnership may sue or be sued in its partnership name, this Court in adopting the rules intended by *mere implication* to abolish the well established rule of law that the separate residence of the partners controlled venue within the meaning of the predecessor section 1391(a), to wit, Judicial Code section 51.* If there were any intention to make this radical change in the law, Rule 82 would not have been adopted and Congress in enacting section 1391 would have expressed that purpose in clear and unmistakeable language. When it was found desirable that the state of incorporation of a company should not determine its residence for venue purposes, and that it should also be determined by the place where it was licensed to do business or was doing business, the Revisers of the Judicial Code added section 1391 (c), (*ante*, p. 5).** With respect to partnerships, not only was there no such provision added but the notes referred specifically to *Smith* v. *Lyons* (see *ante*, p. 9). Whether or not the section should be further amended to provide that the residence of a partnership should be at its principal place of business for venue purposes is a question of policy upon which opinions may well differ. It is submitted that the question is for Congress and not for the courts. Clear it is, there is no indication in any of the applicable rules and statutes, state or federal, that there was any such intention.

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* We must always bear in mind that we are dealing only with capacity, "*technical capacity*". William D. Mitchell, Esq., Chairman Advisory Committee. *Ante*, p. 15.

** As pointed out in Moore, *Commentary on the Judicial Code*, pp. 192, 194.

C.

IF, HOWEVER, IT BE ASSUMED *arguendo* THAT THE QUESTION HERE PRESENTED IS TO BE DETERMINED BY ASCERTAINING WHETHER A PARTNERSHIP IS DEEMED A SEPARATE ENTITY UNDER THE LAW OF NEW YORK FOR VENUE PURPOSES, THE ANSWER IS THAT A PARTNERSHIP UNDER THAT LAW DOES NOT HAVE A SEPARATE RESIDENCE FROM THAT OF THE PARTNERS.

As above stated, section 222(a) of the Civil Practice Act was enacted following the Eleventh Report of the Judicial Council which had drafted and recommended the enactment of the section. That Report at page 233 stated as follows:

> "*Since a partnership is not a legal entity,* the doctrine that a foreign corporation not doing business within the state is not subject to personal service although one of its officers or directors happens to be in New York temporarily, would not seem to apply to the case of a partner coming into New York temporarily."

As a footnote to the foregoing statement the Report states:

> "It is assumed in the discussion of the validity of the recommended amendments, that the enactment of recommended section 222(a) permitting suits by and against a partnership in the partnership name, together with present sections 12 and 21 of the Partnership Law permitting partnerships to hold real property in the partnership name *will not be held to have the effect of converting partnerships into legal entities having a separate existence from that of the partners.* Such effect is believed to be unlikely."

This statement in the Council's Report clearly indicates that section 222(a) was not intended to create the partnership as an entity for the purposes of that section or of any other section. The statement of the Judicial Council is of course of controlling importance in any judicial determination of legislative intent.

Williams v. *Hartshorn*, 296 N. Y. 49, 69 N. E. 2d 557 (1946), holds that a New York partnership is not a separate legal entity unless the legislature so considered it. In that case, plaintiff was the administrator of a partnership employee who died as a result of injuries sustained in the course of his employment. Defendant was only one member of the partnership. Defendant individually owned the building wherein the partnership carried on its business and wherein the employee was killed. Plaintiff sued defendant in a common law action for negligence in the maintenance of said building. Plaintiff contended that the partnership and not defendant was the employer; that the Workmen's Compensation Law prohibited common law actions for negligence only against employers; and that therefore the Workmen's Compensation Law did not bar the action against defendant. The New York Court of Appeals rejected this contention stating:

> "Nor does the fact that defendant herein is but one member of the partnership which employed decedent alter the result. *While the Legislature has the right to consider a partnership apart from its members (Matter of Schwartzman, 288 N. Y. 568), in the absence of such legislative treatment, a partnership is not to be regarded as a separate entity distinct from the persons who compose it.* (Partnership Law, Sec. 10; *Caplan* v. *Caplan*, 268 N. Y. 445; *Matter of Lyle* v. *Lyle Cider & Vinegar Co.*, 243 N. Y.

257; *Matter of Peck*, 206 N. Y. 55; *Park* v. *Union Mfg. Co., supra.*)

"It is clear, then, that the present action cannot be maintained, for its prosecution would violate not only the letter of the statute, but, also its very spirit and purpose."

Conceding that the legislature has the right to consider a partnership as an entity apart from its members, there has been no such legislative treatment in Section 222a and in the absence thereof, as held in the foregoing case, the partnership would not be regarded as a separate entity for venue purposes in New York. This decision also disposes of the argument of the petitioners that under the New York Partnership Law (largely the Uniform Act) a partnership is deemed to be an entity for all purposes,—because in support of its statement that in the absence of legislative treatment a partnership is *not* so to be regarded, the Court of Appeals cites section 10 of the New York Partnership Law. That section provides that "a partnership is an association of two or more persons to carry on as co-owners the business for profit".

In *Helvering* v. *Smith*, 90 F. (2d) 590, Judge Learned Hand, speaking for the Circuit Court of Appeals for the Second Circuit, said:

"The Uniform Partnership Act which is the law of New York (Partnership Law N. Y. [Consol. Laws N. Y. c. 39]), did not, as the taxpayer supposes, make the firm an independent juristic entity."

In support of this statement he discussed the history of the Uniform Partnership Act and showed that the entity theory had been rejected.

To the same effect is the article in 29 Harvard Law Review, 158 and 291 by William Draper Lewis, Esq., who drafted the Act after the entity theory was rejected.

In view of the foregoing, it is a wholly unnecessary and useless task to attempt to review the "New York Decisional Law" set forth at pages 72 and the succeeding ten pages of the petitioners' brief. In interpreting certain other statutes and in applying various equitable principles, such as the marshalling of assets, the New York courts may have recognized the partnership as an entity for the limited purposes there involved. However, none of these statutes and principles has any application here. Petitioners attempt to make much of the case (at pp. 78 to 79 of their brief) of *Wegman* v. *Republic Camera Co.*, 190 Misc. 513, decided in the Supreme Court of New York County, wherein it was held that under *a rule of court* limiting trial preferences to residents of New York, a partnership having its office in New York would be deemed to have such a residence. However, in that case the court was concerned with the interpretation of its own *rule* (Rule V) and not the construction of section 222(a) of the Civil Practice Act.*

On the other hand, in *Cirelli* v. *Ponte,* reported in the New York Law Journal of February 4, 1949, page 450, the Supreme Court of Queens County in 1949 (after the enactment of section 222(a) in 1945) held that a partnership has no residence separate and apart from its residence *for venue purposes.* That case interpreted section 182 of the Civil Practice Act which provides:

> "§182. Place of trial at residence. An action in the supreme court not specified in the *five* following sections must be tried in the county in which one of the parties resided at the commencement thereof. An executor, administrator, trustee or receiver shall

* That this was the interpretation of the local rule, *irrespective of Section 222(a),* appears from the fact that the rule was similarly interpreted in 1935 (ten years before the enactment of Section 222(a)) in the case of *Jenkins* v. *Stern,* cited in the footnote to page 78 of petitioners' brief.

be deemed a resident of the county of his appointment, as well as the county in which he actually resides. If neither of the parties then resided in the state it may be tried in any county which the plaintiff designates for that purpose in the title of the summons or complaint. A party having or maintaining a residence in more than one county shall be deemed a resident of either county.

The opinion in the *Cirelli* case, which is not officially reported, reads as follows:

> "Motion by the defendant Green Bus Lines, Inc. to change the venue of this action from New York to Queens County. It is evident from the papers that none of the parties to this action was a resident of New York County, where the action is now pending, at the time of its commencement. *The plaintiff urges, however, that the defendants Ponte, doing business under the firm name and style of Ponte Brothers, have their office and principal place of business in New York County, and for that reason that county was the proper one in which to lay the venue of this action.* There is no merit to this contention, since a partnership has no residence distinct from the residences of the partners (Bulkley *v.* O'Donnell, 148 Misc. 186, 265 N. Y. S., 495, aff'd 240 App. Div. 929, 267 N. Y. S. 983). Since it is not denied that the plaintiff herein resided, at the commencement of this action, in Queens County, and the defendants Ponte Brothers resided in Kings County, and the principal place of business of the moving corporation is in South Ozone Park, Queens County, this action was improperly brought in New York County (section 182, C. P. A.) and the motion to change the venue to Queens County must, accordingly, be granted. Submit Order."

Section 222(a) has no relation to venue. Its purpose was to provide a convenient method of instituting actions by or against a partnership without making the individual partners parties, and the section provides the effect of service on one partner in such a suit. If there had been any intent to affect requirements as to venue in actions in a state court, that intention would have been expressed by an amendment to section 182 of the Civil Practice Act quoted above at p. 23.

From the foregoing it appears to be clear that even under the law of New York the mere fact that a partnership may sue or be sued in its partnership name does not make the partnership a jural entity and in nowise changes the law existing there prior to the enactment of section 222(a), namely, that the residence of the partners controls in the New York Courts.

D.

THE PENNSYLVANIA CASE OF *Darby* v. *Philadelphia Transportation Company*, 73 F. SUPP. 522, UPON WHICH PETITIONERS PLACE CHIEF RELIANCE IS NOT APPLICABLE.

This case considered the local law of Pennsylvania as determinative of venue and decided the question on the basis of its interpretation of the local law. The court found that under Pennsylvania law a partnership was considered a jural entity and held that therefore venue was properly laid in the district where the partnership did business. In fact, the Pennsylvania rules of Civil Procedure expressly so provide. Rule 2130 (a) of the Pennsylvania Rules of Procedure (12 Purdon Pennsylvania Statutes annotated, appendix) provides:

> "Except as otherwise provided by subdivision (c) of this rule, an action against a partnership may

> be brought in and only in a county where the partnership regularly conducts business, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of action arose."

To this rule, which was adopted effective May 1, 1939, there is appended the following official explanatory note:

> "Note: While a partnership may be regarded as merely a group of individuals, the extended recognition of the entity theory of partnerships given by the legislature and the courts of Pennsylvania warrants treating a partnership as an entity for the purpose of determining where suit should be brought against the firm upon firm liabilities."

It also is to be noted that the court interpreted the Uniform Partnership Act in force in Pennsylvania as recognizing a partnership as a jural entity whereas in New York, as appears from *Williams* v. *Hartshorn*, 296 N. Y. 49 (*ante*, p. 21) just the contrary is held.

Even accepting petitioners' argument that Rule 17(b) in effect incorporates for venue purposes the law of the particular state in which the district court is sitting, the venue in the District Courts in each state may well be different just as the Pennsylvania rule is different from that of New York. Under these circumstances, if local law is to be determinative as to venue, local law would be the basis of the interpretation of section 1391(a), and upon certiorari in such cases this court would be asked to interpret the local law of the particular State in which the District Court was held. An interpretation in this case would be of no general importance. Under such circumstances, the statement of this court in *Helvering* v. *Stuart*, 317 U. S. 154, 164, is peculiarly applicable. There this court said:

"If reasonably avoidable we should certainly avoid becoming a court of first instance of determining the local law prevailing in the forty-eight states."

E.

THE DECISION IN *Sperry Products* v. *Association of American Railroads,* 132 F(2D) 408, DID NOT CONSIDER THE QUESTION PRESENTED HERE.

In that case, suit was instituted for patent infringement against the Association of American Railroads, an unincorporated association, and a number of individual defendants. The action was dismissed below on the ground that the action had been instituted in the wrong district. Thereafter, plaintiff discontinued the action against all but the Association, an individual defendant and a New York railroad. Under the Judicial Code, the action being one for patent infringement, the suit had to be instituted in the district where all of the defendants were inhabitants. Judge Learned Hand for the Circuit Court of Appeals pointed out that in the *Coronado* case, 259 U. S. 344, this court laid down the rule that unincorporated associations could be sued as such and stated "Rule 17(b) now covers the same ground." He then held that an unincorporated association for the purpose of suit had come to be regarded as a jural entity and could see "no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents." It is, of course, obvious that the court would have reached the same conclusion with respect to unincorporated associations irrespective of Rule 17(b) which was indicated to be simply declaratory of the existing law with respect to associations. The court did not have before it the question

as to whether Rule 17(b) had any relation to or was intended to enlarge venue; nor whether it was intended to *change* the existing law with respect to the venue of actions in *partnership* cases; nor the effect of the incorporation by reference of a state statute and in turn its interpretation. Nor did it consider whether the interpretation which the petitioners seek here would be a violation of Rule 82.

F.

IN ANY EVENT AS PETITIONERS DID NOT BRING THEIR SUIT IN THEIR PARTNERSHIP NAME AND THUS DID NOT AVAIL THEMSELVES OF THE PERMISSION GRANTED BY RULE 17(b) AND SECTION 222(a) OF THE NEW YORK PRACTICE ACT, THE QUESTION WHICH THEY SEEK TO HAVE REVIEWED HERE IS NOT PRESENTED.

Section 222(a) of the N. Y. Practice Act became effective September 1, 1945. It was recommended by the Judicial Council of the State of New York which drafted the bill. (Eleventh Annual Report, New York Legislative Document No. 15 (1945). At page 226 of this Report the Council states:

> "It should be noted that the right to sue or be sued in the partnership name conferred by the recommended section is an additional and permissive, and not a substitutional or mandatory, provision. *Therefore, the parties may if they prefer, proceed as heretofore by stating the respective names of the individual partners.*"

In the case at bar, petitioners did not avail themselves of the permission granted by Rule 17b and the New York Statute but preferred to proceed as before "by stating the respective names of the individual partners." The summons and complaint named the five individual part-

ners as plaintiffs (R. 3-7) and the complaint throughout refers to the plaintiffs (R. 7-9). Nowhere is the partnership referred to. The caption and the allegations are in form and substance those customarily and necessarily used prior to the enactment of section 222(a) at the time when there was no statutory authorization in New York for a partnership to sue or be sued in its partnership name.

As the petitioners have not availed themselves of the provisions of Rule 17(b) and the New York Statute, the question which they seek to raise is not even presented because there is no room to argue here that the partnership *qua* partnership is the plaintiff.

Conclusion to Point I.

It is submitted that from the foregoing argument it appears

(1) That there is no substantial basis for the contention that a partnership suing in the District Court in New York has a separate residence for venue purposes.

(2) That there is no ground for certiorari as there is no conflict of decision or any important question of local law which has been decided in conflict with applicable decisions.

(3) That therefore there is no need for this Court to consider the other two questions set forth by the petitioners as the basis of their application for a writ.

However, those questions will be briefly discussed in the succeeding points.

POINT II.

The Court of Appeals correctly held that the District Court's order directing transfer of this cause to California because of improper venue was not appealable.

The provisions permitting transfer rather than dismissal of the action were first enacted by sections 1404(a) and 1406 of the United States Code effective September 1, 1948. In every case where the question of the appealability of an order granting or refusing transfer has arisen, the Courts of Appeal have held that the order is not final and therefore not appealable.

Jiffy-Lubricator Co. Inc. v. *Stewart Warner Corp.*, 177 F. (2d) 360 (C. A. 4th, 1949);

Magnetic Engineering & Manufacturing Co. v. *Dings Mfg. Co.*, 178 F. (2d) 866 (C. A. 2d, 1950);

Ford Motor Co. v. *Ryan*, 182 F. (2d) 329 (C. A. 2d, 1950);

Adelman v. *Paramount Pictures, Inc.*,* Court of Appeals, Third Circuit, December 6, 1950.

In the *Jiffy-Lubricator* case this Court denied certiorari in 338 U. S. 94.

The cases of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 and *Swift & Co.* v. *Compania Colombiana*

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* The court simply stated: "The order complained of is not appealable under Section 1291 or Section 1292, Title 28, United States Code." In a companion case *sub nom, Paramount Pictures, Inc.* v. *The Honorable Richard S. Rodney,* United States District Judge (Tivoli Realty Co. Inc., intervenor), referred to at page 38, *post,* the court considered the reviewability of the said order of the District Court by writ of mandamus.

Del. Caribe, 339 U. S. 684 (1950), relied on by the petitioners, are not relevant. In the *Cohen* case, the District Court denied a motion to require plaintiff in a minority stockholders' suit to give security as required by the New Jersey statutes, and in the *Swift* case, the District Court vacated an attachment taken out to secure a judgment in admiralty. In those cases this court simply held that orders denying security were appealable before final judgment because if the determination of the question of the correctness of the order in the appellate court were delayed until appeal from the final judgment, a decision reversing the District Court's conclusions would be wholly valueless *in that a requirement of security given after judgment in favor of the plaintiff would be clearly of no avail.* That the unusual situation presented in those cases was the basis of the Court's conclusion is indicated in the *Cohen* case by its reference to section 1292 of the Code as indicating a purpose to allow appeals from orders other than final judgments "when they have a final and irreparable effect on the rights of the parties" (337 U. S. at 545), and from the statement in the *Swift* case that if the libellants were ultimately successful judgment might well avail them nothing unless duly secured (339 U. S. at 695).

The petitioners place their whole argument upon the sentence in the *Cohen* case that the order there represents "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." If this sentence is to be taken from its context and applied to the present order, then the ancient and basic limitations on appeal in the Federal courts from interlocutory orders will be wiped out.

In *Ex parte Park Square Automobile Station,* 244 U. S. 412 (discussed under the next point with respect to the right to file petition for mandamus), the court at page 413

points out that a writ of error had been sued out to review the order denying the remand of the case and that that writ had been dismissed in 243 U. S. 633 because the appeal was from an interlocutory order. Thus it appears that the very type of order here involved has been held non appealable by this Court.

POINT III.

The motion for leave to file petition for mandamus was properly denied.

The petitioners moved the Court of Appeals for leave to file a petition for mandamus (MR. 1). The petitioners fail to distinguish between a denial of a motion for leave to file a petition for mandamus and a decision on the merits which might be made were leave granted to file such petition. Upon an application for leave to file a petition, the question is whether the substantive question sought to be reviewed prior to final judgment may be so reviewed by mandamus. It is only after this question has been determined in favor of the petitioner that the substantive question is before the court for review. This court has on instances decided the substantive question against the petitioner and for that reason has denied leave to file the petition without passing on the right to mandamus. Petitioners seek certiorari because the Court of Appeals refused to permit the filing of their petition and attack the reasons which the court assigned, as set forth in *Magnetic Engineering & Mfg. Co.* v. *Dings,* 178 F. (2d) 866, upon the authority of which its refusal was based.

However, as it will be shown that the denial of the petition for leave to file was not error, the reasons which the

Court of Appeals may have assigned for such denial become immaterial, as has been held in this Court.*

That the denial of leave to file the petition was correct is established by closely analogous cases decided in this court.

In *Ex Parte Park Square Automobile Station,* 244 U. S. 412 (1917) it was held that mandamus would not lie to review an erroneous interlocutory order concerning change of venue. In that case, petitioner was a corporation which sued the American Locomotive Company in a *New Hampshire* state court. The Locomotive Company, executing a bond for removal, filed the record in the District Court of the United States for the Northern District of *New York* upon the ground that it was an inhabitant of and had its principal place of business in the New York district. Petitioner thereupon moved to remand solely on the ground that the removal could only be had to the proper district—the United States District Court of New Hampshire. The United States District Court for the Northern District of New York *refused* to direct a remand.

Petitioner's writ of error in the Supreme Court being dismissed because there was no final judgment, it applied for a writ of mandamus. This Court held that mandamus would not lie. Because this court's opinion in that case rejects most of the arguments advanced by petitioners here, a substantial portion of said opinion is set forth (244 U. S. 414-416):

> "At the threshold, however, we are met by the suggestion that, conceding for the sake of the argument that the lower court erred in refusing to

* "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran,* 302 U. S. 238, 245, and cases cited.

remand and in taking jurisdiction, as such error was susceptible of being reviewed by the regular methods provided by the statute, that is, by certificate and direct review on the question of jurisdiction alone *after final judgment,* or by review of the Circuit Court of Appeals where allowed if the whole case were taken to that court, or by the exercise by this court of its power to issue a writ of certiorari in a proper case, there is hence no power to substitute the writ of mandamus as a means of reviewing for the express remedial processes created by the statute for such purpose.

"It is not disputable that the proposition thus relied upon is well founded and hence absolutely debars us from reviewing by mandamus the action of the court below complained of, whatever may be our conviction as to its clear error, *Ex parte Harding,* 219 U. S. 363; *Ex parte Roe,* 234 U. S. 70, unless it be that by some exception the case is taken out of the reach of the control of the cases referred to. *It is insisted that this case is such an exceptional one, first, because of the clearly erroneous construction of the statute upon which the court below based its assertion of jurisdiction* and the strange result which arose from that construction, that is, the removal of a case pending in the state court of New Hampshire to a district court in the State of New York, *and second, because of the grave wrong which would result from forcing the petitioner to try its case in the State of New York at great inconvenience and expense as a preliminary to securing a review of the question of jurisdiction,**—an expense and inconvenience which would be saved if by review now by means of a writ of mandamus the removal statutes be given their natural meaning and thus the wrong and confusion arising from their misconstruction would be avoided. And, in support of the ex-

* The very argument petitioners advance here.

ceptions thus asserted, reliance is placed on expressions contained in the opinion in *Ex parte Harding*, 219 U. S. 363, 373, by which it is contended they are sustained.

"But *conceding that the error which the proposition attributes to the ruling below is manifest*, the conclusion drawn from the opinion in *Ex parte Harding* is obviously a mistaken one. Indisputably in that case the court was called upon to consider in a two-fold aspect some contrariety of views manifested in decided cases, first, as to the power to correct an unwarranted exercise of jurisdiction by way of proceedings in mandamus in a case where no method of review of such questions was otherwise provided, and second, the right to resort to mandamus in disregard of and as a substitute for express and positive statutory regulations pointing out the method by which such review could be had. Bearing this in mind, it is plain that the language relied upon in *Ex parte Harding* related to the first class and established the doctrine that even in a case where no means of review were provided by statute, the writ of mandamus could be used only in exceptional cases calling for an exceptional remedy. But this did not in the slightest degree qualify or limit the comprehensive rule which was established as to the second class to the effect that, where statutory methods of review of questions of jurisdiction were provided for, they could not be disregarded, and therefore that there was no power to override the statutory provisions by resorting to the writ of mandamus.

"*—And this also makes clear that however grave may be the inconvenience arising in this particular case from the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule and reviewing the action*

of the court by resort to a writ of mandamus instead of leaving the correction of the error to the orderly methods of review established by law."

Ex Parte Park Square Automobile Station, supra, is controlling here. In that case, the ruling of the federal court for the Northern District of New York deprived another federal court of the right to determine the controversy. However, inasmuch as jurisdiction of the action still was vested in a federal court and could be reviewed in the federal courts after final judgment, the Supreme Court held that the extraordinary remedy of mandamus would not lie. It so ruled even though it recognized that petitioner there would be put to great inconvenience and expense if it had to try the case in the Northern District of New York. It so ruled although it was evident that petitioner would not be recompensed for such inconvenience and expense even if it succeeded in having the cause remanded after final judgment.

So here, the ruling in the District Court below does not deprive the federal courts of jurisdiction. Jurisdiction of the action at bar will lie in the federal court for the Northern District of California, Southern Division and the change of venue will be reviewable there after judgment by normal appellate procedures.

Obviously, in view of the decision below in the Court of Appeals, the District Court in New York would carry out any decision in the Ninth Circuit and would retain the case should the Ninth Circuit on appeal from a final judgment against the plaintiffs determine that venue in New York was proper and the transfer improper. Similarly, if the Court of Appeals in the Ninth Circuit should entertain an application for mandamus and send the case for trial to New York, the New York court would undoubt-

edly abide by such determination and retain the case. For these reasons the elaborate argument at page 15 et seq. of petitioners' brief is wholly unrealistic.

Petitioners argue (at p. 37 of their brief) that the decision below is so erroneous that it was not merely an error but a usurpation of power. The petitioners, however, fail to distinguish between the power or jurisdiction of the district court to adjudicate a question presented to it and an erroneous decision made upon a determination of a question which it has jurisdiction to determine. The District Court had jurisdiction here to determine the question of proper venue and the question of jurisdiction is in nowise affected by the fact that the decision may have been erroneous. In *Ex Parte Greutter,* 217 U. S. 586, this question was so decided with respect to determination as to venue.

In *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, the court at pages 29 and 31, cited the *Park Square* case with approval. That case originated as an action by the United States against the Milk Association for violation of the Sherman law. In the District Court, on demurrer by the United States, the defendants plea to an abatement to the indictment was stricken. Upon application for mandamus in the Circuit Court of Appeals that court granted the writ and directed reinstatement of the plea and the government's replications thereto. Upon certiorari to this court, the decision of the Circuit Court of Appeals was reversed, this court stating at page 26:

> *"But the present case involves no question of the jurisdiction of the district court. Its jurisdiction of the persons of the defendants, and of the subject matter charged by the indictment, is not questioned.*
>
> • • • • • •

> *"Nor does this case involve a refusal by the district court to adjudicate issues properly presented to it, such as justified the issuance of the writ in McClellan* v. *Carland, supra.* * * * *Its decision, even if erroneous—a question on which we do not pass—involved no abuse of judicial power, and any error which it may have committed is reviewable by the circuit court of appeals upon appeal appropriately taken from a final judgment, and by this Court by writ of certiorari."*

The opinion in *Tivoli Realty* v. *Paramount,* referred to in the footnote at page 43 of the petitioners' brief (which has now come down and which is asserted may conflict with the denial of petitioners' petition for leave to file mandamus in the present case) discloses no such conflict. In that case the question was as to the power of the District Court and not the question as to whether the Court in the exercise of its power had reached a wrong conclusion. This is clear from the opening sentence of the Court's opinion where it was said:

> "The question presented by the cases at bar is whether the United States District Court for the District of Delaware on a motion made by all of the defendants, opposed by the plaintiffs, has the *power* under Section 1404(a) of Title 28, United States Code, to transfer to an appropriate United States district court in Texas two suits based on the anti-trust laws of the United States. The trial court concluded that it lacked the authority to transfer the actions. 89 F. Supp. 278. We disagree." (Emphasis by the court.)

So, too, in *Foster-Milburn* v. *Knight,* 181 F. (2d), 949 (petitioners' brief, p. 43), the Court of Appeals held that an order of the district court transferring the action under

Section 1404(a) of the Judicial Code to a district which was not one in which the action could have been brought, was appropriate for review by mandamus, because the district court had no power whatever to issue such an order. Said the Court (p. 951):

> "In the case at bar the question is whether the district court has any *power* to consider the question at all; if it has not, the transfer will be a nullity, for, as we shall show, the District Court for the Southern District (Northern Division) of California will have no jurisdiction over the defendants, and any judgment it may enter will be void."

POINT IV.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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